

## TEMPORARY AND LAWFUL POSSESSION

Revised May 2021<sup>1</sup>

The defendant [as you are aware] has raised the defense of innocent possession of (specify weapon).

Under our law, in certain circumstances, the possession of a weapon may be innocent and not criminal. Innocent possession of a weapon is possession that is temporary and not for an unlawful purpose.<sup>2</sup>

A person has innocent possession of a weapon when that person comes into possession of the weapon in an excusable manner, and maintains possession, or intends to maintain possession, of the weapon only long enough to dispose of it safely.<sup>3</sup>

[Note: Add if appropriate:

Taking possession of a weapon for any period of time for the general purpose of protection in the future is not excusable and does not constitute innocent possession.<sup>4</sup>]

The defense contends that the defendant (specify, e.g.: found the weapon; disarmed an assailant [and used it justifiably in self-defense]; intended to turn it over to the police; was about to turn it over to the police when arrested; turned it over the police at the first opportunity).

*Note: The court should tailor the following relevant factors to the defendant's contentions<sup>4</sup> :*

There is no single factor that by itself determines whether there was innocent possession.<sup>5</sup> In making that determination, you may consider:

any evidence which establishes that the defendant had knowing possession of a (specify weapon); the manner in which the (specify weapon) came into the defendant's possession;

Note: Add if appropriate:

if you find that the defendant took the (specify weapon) from an assailant and then used it,<sup>6</sup> whether that use was justified;<sup>7</sup>

whether the length of time the (specify weapon) remained in the defendant's possession was reasonable under the circumstances;<sup>8</sup>

whether the defendant had intended to safely dispose of (specify weapon);<sup>9</sup>

whether the defendant had a reasonable opportunity to turn the (specify weapon) over to the police or other appropriate authority; and if and when the defendant did have such opportunity, whether the defendant did so;<sup>10</sup>

Note: Add if appropriate:

Or, if as the defendant contends, he/she safely disposed of the (specify weapon), or intended to do so, by another means,

whether choosing another means was reasonable and whether the defendant did so, or intended to do so, in a manner that did not, or would not, place or potentially place any person or persons in jeopardy from the discovery of the weapon and thus its potential use by another.<sup>11</sup>

The defendant is not required to prove that his possession of the weapon was innocent. Rather, the People are required to prove beyond a reasonable doubt both that the defendant knowingly possessed the weapon and that such possession was not innocent.<sup>12</sup>

*NOTE: The following should be added to the list of elements of the pertinent offense:*

and #. That the defendant's possession was not innocent.

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<sup>1</sup> This instruction, as it existed prior to May 2021, was approved in *People v Griggs*, 108 AD3d 1062, 106 [4th Dept 2013] and *People v Davis*, 103 AD3d 810, 812 [2d Dept 2013]. In May 2021, it was amended primarily to include factors consider by the Court of Appeals in *People v Williams*, 36 NY3d 156 [2020]. In particular, paragraph one and five and the “*Note: Add if appropriate*” sentences were added and the factors specified in paragraph six were expanded as indicated in endnote five. The endnotes were also revised to provide further guidance.

<sup>2</sup> *Williams* summarized the applicable law as follows:

This Court has long held that criminal possession of a weapon, as proscribed by the Penal Law, "should not be construed to mean a possession . . . which might result temporarily and incidentally from the performance of some lawful act" In order to trigger the right to a jury charge concerning the defense of temporary and lawful possession, "there must be proof in the record showing a legal excuse for . . . possession as well as facts tending to establish that, once possession has been obtained, the weapon had not been used in a dangerous manner." In accordance with those principles, the pattern jury charge relating to temporary and lawful possession explains that "[a] person has innocent possession of a weapon when [that person] comes into possession of the weapon in an excusable manner and maintains possession, or intends to maintain possession, of the weapon only long enough to dispose of it safely" (CJI2d[NY] Temporary and Lawful Possession).

In that regard, we have explained that "[a] defendant may not be guilty of unlawful possession if the jury finds that [the defendant] found the weapon shortly before [the defendant's] possession of it was discovered and [the defendant] intended to turn it over to the authorities." We have also indicated that temporary and lawful possession may result where a defendant "took [the firearm] from an assailant in the course of a fight" and the circumstances do not otherwise evince an intent to maintain unlawful possession of the weapon. In such scenarios, "[t]he innocent nature of the possession negates . . . the criminal act of possession." Ultimately, whether the weapon is found fortuitously or obtained by disarming an attacker, "the underlying purpose of the charge is to foster a civic duty on the part of citizens to surrender dangerous weapons to the police." *Williams*, 36 NY3d at 160-61 (case citations omitted).

<sup>3</sup> *Williams*, 36 NY3d 156.

<sup>4</sup> See *Williams*, 36 NY3d at 168 (concurring opinion) ["as with all jury instructions, the trial court may need to tailor to the facts of a given case]; *People v Thomas*, 172 AD2d 572, 573 [2d Dept 1991] ["the trial court

improperly ruled that it could not tailor its charge to the facts of the case, as further requested by defense counsel”].

<sup>5</sup> The 2021 amendments to this instruction added or expanded the existing version of the factors in this paragraph. Prior to the amendment this paragraph read as follows:

“There is no single factor that by itself determines whether there was innocent possession. In making that determination, you may consider any evidence which establishes that the defendant had knowing possession of a weapon, the manner in which the weapon came into the defendant's possession, the length of time the weapon remained in his/her possession, whether the defendant had an intent to use the weapon unlawfully or to safely dispose of it, the defendant's opportunity, if any, to turn the weapon over to the police or other appropriate authority, and whether and how the defendant disposed of the weapon.”

<sup>6</sup> *People v. Snyder*, 73 NY2d 900, 901-02 [1989] [The defendants wrested a loaded pistol from another person during a fight and made no effort thereafter to safely dispose of the weapon, in particular to take it the State Police barracks that was “around the corner” from where they took possession of the pistol]; *People v. Banks*, 76 N.Y.2d 799 [1990] [while acquiring the weapon by disarming another in a fight “could be deemed justified,” the defendant was not justified in “conceal[ing] the weapon on his person and determine[ing] to transport it through the streets and on the subway into [another borough] where he proposed to ‘throw it down a sewer’ ”].

<sup>7</sup> *People v Peterson*, 233 AD2d 533, 533-34 [2d Dept 1996] [the defense should have been charged where the “defendant testified that he was confronted by the victim who was holding a gun, and believing that he was about to be robbed he grabbed the gun and fired three times in self-defense. He walked away in a state of shock and was arrested minutes later after a brief chase].

<sup>8</sup> *See People v Pereira*, 220 AD2d 696, 697 [2d Dept 1995] [“after coming into possession of a loaded pistol by disarming an assailant, the intoxicated defendant wandered through the streets waving it in a threatening manner at passersby until he was apprehended by the police. Such evidence is utterly at odds with a claim of innocent possession”]; *People v Snyder*, 138 AD2d 115, 119 [3d Dept 1988], *affd*, 73 NY2d 900 [1989] [“the unqualified right of possession following the act of disarming another will end when the weapon is secured and the defendant has had an opportunity to turn it over to lawful authorities. Retention beyond that point will be justified only by an affirmative showing of intent to properly dispose of the weapon and circumstances justifying the defendant's failure to do so promptly”].

<sup>9</sup> *People v Whitehead*, 123 AD2d 895, 896 [2d Dept 1986] [“the court’s charge included the erroneous proposition that such a defense is established only where the defendant had the intent to turn the subject weapon over to the lawful authorities. . . . the defendant’s intent to turn the subject weapon over to the lawful authorities is not a necessary element of the defense of temporary and lawful possession” (emphasis added)].

<sup>10</sup> See *People v Gonzalez*, 262 AD2d 1061, 1061 [4th Dept 1999] [“here the jury could have found that, after defendant disarmed another during the course of a fight, he retained possession of the weapon despite the opportunity to turn it over to lawful authorities”]; *People v Roccaforte*, 141 AD2d 775, 776 [2d Dept 1988] [the “presence and visibility of police precincts along the route traveled by the defendant was proper rebuttal evidence in that it circumstantially controverted the proffered defense”].

<sup>11</sup> See *People v Whitehead*, 123 AD2d 895, 896 [2d Dept 1986] [see note 9]; *People v. Banks*, 76 N.Y.2d 799 [1990] [while acquiring the weapon by disarming another in a fight “could be deemed justified,” the defendant was not justified in “conceal[ing] the weapon on his person and determine[ing] to transport it through the streets and on the subway into [another borough] where he proposed to ‘throw it down a sewer’ ”]; *People v Craig*, 117 AD3d 1485, 1486 [4th Dept 2014] [“Defendant found a loaded gun in a park and took the gun with him when his father drove him to his mother’s house. A police officer found the gun concealed in a bag of clothing after initiating a traffic stop of the vehicle operated by defendant’s father. Although defendant claimed that he intended to turn the gun in at a church’s gun buy back program, defendant’s retention of the gun beyond opportunities to hand it over to the police is “ ‘utterly at odds with any claim of innocent possession’ ”]; *People v Rose*, 2021 NY Slip Op 00577 (2d Dept 2021) (the Court held that the proof established that the defendant had only temporary and lawful possession when he recovered a firearm from an assailant; left the scene with the firearm; unloaded and disposed of it in the trash (i.e. according to the dissent: in a “basement incinerator in the hope” it would be taken away) and it was never recovered).

<sup>12</sup> *People v Holes*, 118 AD3d 1466, 1467 [4th Dept 2014] [a “defendant is not required to prove that [his/her] possession of the weapon was innocent. Rather, the People are required to prove beyond a reasonable doubt both that the defendant knowingly possessed the weapon and that such possession was not innocent (CJI2d [NY] Temporary and Lawful Possession)”]; *People v Sterling*, 151 AD2d 522, 522 [2d Dept 1989] “[it would have been preferable for the trial court to have specifically stated that the People were required to disprove this defense beyond a reasonable doubt”].